

**BOARD OF APPEALS CASE NO. 5289**

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**BEFORE THE**

**APPLICANTS: Omnipoint Communications and  
Naomi and Edward Winesett**

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**ZONING HEARING EXAMINER**

**REQUEST: Special Exception to locate a comm-  
unications tower in the Agricultural District;  
2130 Line Bridge Road, Whiteford**

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**OF HARFORD COUNTY**

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**Hearing Advertised**

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**Aegis: 9/18/02 & 9/25/02**

**HEARING DATE: November 13, 2002**

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**Record: 9/20/02 & 9/27/02**

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## **ZONING HEARING EXAMINER'S DECISION**

The Applicants, Omnipoint Communications Cap Operations, LLC and Naomi and Edward Winesett, are requesting a special exception pursuant to Sections 267-53.4C and 267-53.6 of the Harford County Code, to locate a communications tower in the AG/Agricultural Zone.

The subject tower site is located between Line Bridge Road and Tabernacle Roads, east of Flintville Road on property owned by the Winesetts and which address is 2140 Line Bridge Road, Whiteford, Maryland 21160. The subject parcel is more particularly identified on Tax Map 6, Grid 4D, Parcel 11. The parcel consists of 53.826 acres, is zoned AG/Agricultural and is entirely within the Fifth Election District.

### **Findings of Fact and Conclusions of Law**

A number of witnesses testified both for and against this proposed special exception use. Mr. Bill Waskey appeared and indicated he is employed by T-Mobile, a telecommunications company that will install antennae on the proposed tower. Waskey described the area of the location as rural, about 1 ½ mile from the Pennsylvania state line. The proposed tower is 130 feet in height, is of monopole construction and will accommodate telecommunications equipment for up to 4 carriers. At the base of the pole will be located a fenced area, gravel covered, that will be used for the support equipment for the four potential telecommunications carriers. The entire facility is unmanned and maintenance personnel have scheduled visits at approximate one month intervals.

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The proposed tower location is presently crop land on the easternmost side of the property. The closest home is 800 feet away with others at 1300-1600 feet away from the base of the tower. The witness described significant forest area that will provide some screening and evergreens will be planted around the perimeter of the fenced compound but, admittedly, no tower can be fully screened from view since the tower must protrude above tree lines and surrounding structures in order to be functional. The witness went on to describe the intended coverage area that includes the area of Flintville Road from the Pennsylvania line to Broad Creek. Waskey stated that it is preferable to find either existing towers or high structures in an area to co-locate antennae prior to construction of a tower but there were no other towers or structures in the immediate vicinity that would allow coverage to be provided. Waskey said that the proposed location was a good one because it, (1) was on high ground allowing for a shorter tower height than other towers, (2) existing forest provides good natural screening, (3) the parcel is not in an Agricultural Preservation easement, and (4) this is a large parcel with a great deal of distance between the tower and residential uses. The witness also reviewed the balloon tests that were performed indicating visible impact of this tower from a number of locations. In the opinion of the witness, this tower will have substantially less impact than many other existing towers because of the foregoing factors.

Waskey also reviewed all of the materials filed as part of the Application in this case, indicating that every necessary filing had been completed as required by the Harford County Code. Additionally, submitted as part of the Application process were two studies of the impact of communication towers on property values, both of which concluded that communications towers have been shown to have no adverse impact on property values. Waskey concluded by reviewing the "Limitations, Guides and Standards" of Section 267-9I of the Harford County Code, concluding that no adverse impacts were apparent in light of the provisions of that statute.

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Mr. Danny Lora appeared and qualified as an expert Radio Frequency (RF) engineer. Mr. Lora works for T-Mobile and is responsible for the design of communications systems. In reviewing the design for the proposed tower, Lora evaluates the target area need of the communications carrier and makes an informed prediction of current available network coverage and then, using both computer modeling and drive around data (data regarding coverage obtained by actual fieldwork) he prepares a computer image of post tower construction coverage. He used computer generated propagation models to describe the results of his study which concluded that there is a need for a new tower in the vicinity of the proposed tower and that coverage provided by the proposed tower will fill the existing gaps in coverage. Lora described licensing restrictions that limit the amount of RF emissions that may be transmitted over the Pennsylvania state line, a situation that created significant limitations on site selection. In Lora's opinion, operation of this tower at this location will be well within requirements of operation pursuant to FCC emission guidelines. Lora also stated that propagation maps were submitted to Harford County's RF engineer in accordance with County requirements and that the County's engineer confirmed the need for a tower at this location.

Anthony McClune, Manager Division of Land Use management appeared on behalf of the Department of Planning and Zoning (Department). McClune indicated that the Department had reviewed all aspects of the request and concluded that the Applicant could meet or exceed all of the requirements for approval as set forth in the Harford County Zoning Code. The Applicant has met each and every requirement of the Code. Additionally, the Department reviewed this Application with reference to the Guides, Limitations and Standards set forth in Code section 267-9I and concluded that this tower would have no adverse impacts different from or greater than any other tower on a different parcel in the AG zone.

Ms. Mary Ritchie appeared and indicated that her house at 2213 N. Tabernacle Road, would be the most impacted by the tower. In support of her opposition to this tower, the witness indicated that the tower will be approximately 800 feet from her property and would be fully visible from her house and property. Although the witness felt that screening at the base would help, the tower could never be screened from view and this, according to the witness should result in disapproval of the request. In Ms. Ritchie's opinion, towers like this have no place in the agricultural landscape of Harford County.

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The Harford County Code contains numerous specific requirements that are imposed on all Applicants seeking approval to construct a communications tower in Harford County. Because of the extensive specific requirements of the Code, the Hearing Examiner has set forth below each requirement and his factual findings related to each requirement of the Code.

The applicable Code Sections and the Hearing Examiner's findings (in *italics*) follow:

### **Section 267-53.4.C Communications towers.**

Communications towers shall be allowed by special exception, up to 199 feet, in the R, RR, R1, R2, VR, VB, B1, B2 and AG Districts.

*The proposed tower is less than 199 feet (130 feet proposed) and the subject property is zoned AG.*

### **Section 267-53.5. Provisions applicable to all communications towers.**

- A. All communications towers shall be structurally designed to accommodate for co-location, which shall mean the ability of structure to allow for the placement of antennas for 3 or more carriers. This provision may be waived by the approving body if it is determined that a co-location design will have an adverse impact on the surrounding area.

*This tower is designed for co-location to accommodate four carriers. Additionally, the compound itself is designed to accommodate four (4) communication carriers and supporting equipment.*

- B. No aviation-related lighting shall be placed upon any communications tower unless specifically required by the Federal Aviation Administration or other governmental entity.

*There is no aviation lighting planned for this tower.*

- C. Monopoles shall be the preferred communications tower structure type within the county.

*The proposed tower is a monopole design.*

- D. To the extent practicable, communication towers shall have suitable landscaping in order to screen the site from adjoining properties.

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*Landscaping is proposed along the entire perimeter of the fenced compound. Additionally there is a significant stand of mature forest that provides additional natural screening. Balloon test photographs substantiated the effectiveness of this natural screening..*

- E. The only signage permitted on any communications tower shall be a single sign no larger than 6 square feet, affixed to the equipment building or fence enclosure that identifies the tower owner, each locating provider and the telephone number for the person to contact in the event of an emergency.

*No signage is proposed.*

- F. Upon completion of a communications tower and every 5 years after the date of completion, the owner of the tower shall submit to the Zoning Administrator written certification from a professional engineer verifying that the tower meets all applicable Building Code and safety requirements applicable at the time the original building permit was issued. Failure to submit said certification 60 days of written notification by the Department of Planning and Zoning to the owner of the tower or any successor in interest shall result in the start of the revocation process for the tower approval.

*The Applicant's Application materials and witnesses expressed their intent to comply with these provisions of the Harford County Code.*

- G. All zoning certificate applications for the construction of new communications towers shall be subject to the DAC review process, with the following additional requisites:
  - (1) Whether an applicant has satisfied the radio frequency need requirements identified in this section shall be reviewed by a radio frequency engineer. The engineer shall be retained by the county from an approved panel of such engineers to be created and maintained by the county. The engineer shall determine whether the applicant has shown a radio frequency need, based on coverage and/or capacity issues, or other engineering requisites, to construct a new communications tower;
  - (2) When the communications tower is permitted by right, the engineer's determination shall be made in the ordinary course of DAC review;

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- (3) When the communications tower is allowed by special exception, the county's radio frequency engineering review shall be made in connection with the staff report review pursuant to Chapter A274-1.D. Such review will be completed prior to any zoning hearing and will preclude further DAC review of radio frequency issues; and
- (4) The county's radio frequency engineer shall ensure that any new tower does not interfere with or obstruct existing or proposed communications towers designed for public safety use.

*The Department of Planning and Zoning has recommended as a condition of approval that DAC review and approval be obtained. The applicant submitted for review to the County's RF engineer all requested radio frequency data and the County's RF Engineer issued a favorable report made part of the record as Attachment 11 to the Department of Planning and Zoning's staff report. The County's RF Engineer concluded that the proposed tower fills an identified coverage gap in the existing telecommunications network; that the proposed structure will not require FCC registration or aviation lighting; and confirmed that use of the proposed tower does not interfere with the current or proposed microwave paths for the Public Safety radio system.*

- H. The applicant shall be responsible for maintaining the communications tower in a safe condition.

*The Applicant's application materials and witnesses indicated their intent to comply with these provisions of the Harford County Code.*

- I. Communications towers shall be utilized continuously for wireless communications. In the event that a communications tower ceases to be used for wireless communications for a period of 6 months, the approval will be revoked. In the event that the Zoning Administrator is presented with evidence that further viability of the tower is imminent, the Zoning Administrator may grant one extension of the approval for a period not to exceed 6 months beyond the revocation of the use. The applicant shall take all necessary steps to dismantle the tower and remove and dispose of all visible remnants and materials from the subject parcel 90 days after termination. The applicant shall ensure removal of the tower and all associated accessory structures by posting an acceptable monetary guarantee with the county on forms provided by the office of the Zoning Administrator. The guarantee shall be submitted prior to the issuance of a building permit and shall be for an amount equal to a cost estimate

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approved by the Zoning Administrator for the removal of the tower, plus a 15% contingency.

*The Applicant's application materials and witnesses indicated their intent to comply with these provisions of the Harford County Code.*

J. Every application for the construction of a new communications tower shall include the following:

- (1) Information demonstrating the applicant's radio frequency need for the facility, including computer modeling information, an explanation as to why co-location is not feasible and a list of alternative sites considered;

*The Applicant submitted computer models of the coverage currently existing and resulting after erection of the proposed tower. These models lead to the conclusion that there is a gap in the existing network in and near the proposed location that is filled by the proposed communication tower. The witnesses for the Applicant identified several other locations that they reviewed as a co-location possibility. Each of these proved inadequate or unavailable.*

- (2) A checklist prepared in conformity with Section 106 of the National Environmental Policy Act and any other documents filed by the applicant with the FCC related to this site if requested by the Department;

*The required checklist was submitted by the Applicant and was made part of the Department of Planning and Zoning's Staff Report.*

- (3) A site plan, including the layout of the site, a drawing or other physical depiction of the proposed communications tower and any equipment buildings, and a map showing the area within a one mile radius of the tower;

*A site plan was submitted into evidence and fully described by the Applicant's witnesses. There was no testimony challenging the accuracy of the site plan submitted.*

- (4) A description of the number of carriers' equipment that the tower can accommodate and a statement as to whether the applicant will allow other carriers to co-locate on the facility;

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*The Applicant's witnesses thoroughly discussed the design of the tower to accommodate the antennae and equipment of four (4) carriers. The business model of the Applicants is to construct towers that will lease space to telecommunications carriers and this business model was supported by the evidence presented.*

- (5) Documentation demonstrating the tower shall be designed and constructed in accordance with any applicable American National Standards Institute standards;

*The Applicant has demonstrated that the tower is designed and will be constructed in accordance with applicable American Standards Institute standards.*

- (6) Proof that the applicant owns or otherwise has permission to use the site, along with any easements necessary to access the site;

*The Applicant provided an "Owner Authorization Agreement" executed by and between the co-Applicants.*

- (7) A certification from each carrier that will utilize the facility that its equipment will meet all applicable federal standards governing the emission of energy from such facilities; and

*The Applicant's witnesses testified that FCC requirements regarding emissions will be met by each carrier co-locating on this tower.*

- (8) A non-binding 5-year plan showing the applicant's existing and proposed communications network within the county. In accordance with state law on access to public records, § 10-611 et seq. of the State Government Article, the Department shall treat the 5-year plan it obtains as confidential and shall not permit public inspection of that information.

*The Applicant submitted its plan in accordance with these provisions of the Harford County Code. (Attachment 10 to Staff Report at Tab 9)*

- K. When proposing a new communications tower, the applicant must demonstrate a radio frequency need for such a facility by showing:



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- (1) That the applicant has researched the co-location possibilities in the area, including in its research a review of the county's database of structures; and

*The Applicant provided substantial data to support its efforts to find a suitable co-location tower.*

- (2) That due to the absence of sufficiently tall structures in the search area, the absence of structural capacity on existing structures or other valid engineering or economic factors, no viable co-location opportunities exist in the search area.

*The Applicant provided a full and complete explanation regarding the lack of suitability of each of the possible co-locations it discovered and witnesses for the Applicant testified that high structures, such as silos, were not found in the search area.*

**Section 267-53.6. Additional special exception requirements.**

An applicant proposing a new communications tower in the R, RR, R1, R2, VR, VB, B1, B2 or AG Districts shall demonstrate that the request complies with the following conditions:

- A. The placement of the communications tower at the proposed location will not have a material negative impact on the value, use or enjoyment of any adjoining parcel.

*The Applicant introduced an extensive study of the impact of monopole communication towers on the value of adjoining parcels which concluded that the erection of the proposed monopole at the proposed location will not have a material adverse impact on the value, use or enjoyment of any adjoining parcel. (Attachment 10 to Staff report at Tab 10)*

- B. The applicant has made a diligent attempt to locate the applicant's antenna on an existing tower or nonresidential building or structure.

*The Applicant provided ample evidence of its attempts to co-locate its antennae on an existing tower or structure and fully explained the reasons why none of the possible co-location sites was suitable or available to the Applicant.*

- C. The applicant shall provide the following additional information in support of its application:

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- (1) Photographs of existing site conditions;

*Photographs were provided by the Applicant of the site and surrounding area. (Attachment 10 to Staff Report at Tab 11)*

- (2) Photographs demonstrating that a balloon test has been conducted, or other evidence depicting the visual impact of the proposed tower within a one mile radius of the tower; and

*Computer generated models and balloon test photos were submitted by the Applicant and fully indicate the visual impact created by this tower within a one mile radius of the proposed location. (Attachment 10 to Staff Report at Tabs 7 and 8)*

- (3) A map describing the topography of the site and the area within a one-mile radius of the proposed tower.

*The Applicant submitted a map that indicates the topography of the site within a one mile radius of the proposed site. (Attachment 10 to Staff Report at Tab 12)*

In addition to meeting each of the above requirements, the testimony of Bill Waskey and Anthony McClune addressed each of the “Limitations, Guides and Standards” set forth at Section 267-9I of the Harford County Code and, after addressing each of those, both witnesses concluded that this tower at this location would generate no material impacts over and above those normally associated with a monopole communication tower of this height. The Department of Planning and Zoning recommends approval of the requested special exception.

## **Conclusion And Recommendation**

The Hearing Examiner finds, based on the facts set forth above, that the Applicant can meet or exceed each and every requirement of the Harford County Code. In addition to specific statutory requirements, Maryland Courts have had occasion to discuss the burden of proof that must be met by an applicant in a special exception case.

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Under Maryland law, the special exception use is part of the comprehensive zoning plan sharing the presumption, that, as such, it is in the interest of the general welfare, and therefore, valid. The special exception use is a valid zoning mechanism that delegates to an administrative board a limited authority to allow enumerated uses which the legislature has determined to be permissible absent any fact or circumstance negating the presumption.

The duties given the Board are to judge whether the neighboring properties in the general neighborhood would be adversely affected and whether the use in a particular case is in harmony with the general purpose and intent of the plan. Schultz v. Pritts, 291 Md. 1, 432 A. 2d 1319, 1325 (1981) (“Schultz”).

“While the applicant in such a case has the burden of adducing testimony, which will show that, his use meets the prescribed standards and requirements of the zoning code, he does not have the burden of showing affirmatively that his proposed use accords with the general welfare. If he shows to the satisfaction of the Board that the proposed use would be conducted without real detriment to the neighborhood and would not actually adversely effect the public interest, he has met his burden. The extent of any harm or disturbance to the neighboring area and uses is, of course, material; but if there is not probative evidence of harm or disturbance in light of the nature of the zoning involved or of factors causing disharmony to the functioning of the comprehensive plan, a denial of an application for special exception is arbitrary, capricious, and illegal. Turner v. Hammond, 270 Md. 41, 54-55, 310 A. 2d 543, 550-551 (1973) (“Turner”).

The appropriate standard to be used in determining whether a requested special exception use should be denied is whether there are facts and circumstances that show the particular use proposed at the particular location proposed would have any adverse effect above and beyond those inherently associated with such a special exception use irrespective of its location within the zone.” See Schultz at 432 A. 2d 1327.

Such facts and circumstances must be strong and substantial to overcome the presumption that the proposed use be allowed in the district. Anderson v. Sawyer, 23 Md. App. 612, 329 A. 2d 716, 724 (1974) (“Anderson”).

The law in Maryland is clear that the localized impact caused by a special exception must be unique and atypical in order to justify denial. Sharp v. Howard County Board of Appeals, 98 Md. App. 57, 632 A. 2d 248 (1993) (“Sharp”).

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In determining whether the presence of the proposed uses would be more harmful here than if located elsewhere in the AG zone, one must take into account the area where the use is proposed. AT&T Wireless Services v. Mayor and City Council of Baltimore, 123 Md. App. 681, 720 A. 2d 925 (1998) (“AT&T”).

In Mossburg v. Montgomery County, 107 Md. App. 1, 666 A. 2d 1253 (1995) (“Mossburg”) the Court of Special Appeals had occasion to restate and clarify the law in Maryland regarding special exceptions. There the Court found that the Board of Appeals of Montgomery County improperly denied a special exception for a solid waste transfer station in an industrial zone. In reversing the Circuit Court, which upheld the Board's decision, the Court of Special Appeals found that the decision to deny the special exception was not based on substantial evidence of adverse impact at the subject site greater than or above and beyond impact elsewhere in the zone and, therefore, the decision was arbitrary and illegal. There the Court said:

“The question in the case sub judice, therefore, is not whether a solid waste transfer station has adverse effects. It inherently has them. The question is also not whether the solid waste transfer station at issue here will have adverse effects at this proposed location. Certainly it will and those adverse effects are contemplated by the statute. The proper question is whether those adverse effects are above and beyond, i.e. greater here than they would generally be elsewhere within the areas of the County where they may be established, ... In other words, if it must be shown, as it must be, that the adverse effects at the particular site are greater or “above and beyond”, then it must be asked, greater than what? Above and beyond what? Once an applicant presents sufficient evidence establishing that his proposed use meets the requirements of the statute, even including that it has attached to it some inherent adverse impact, an otherwise silent record does not establish that that impact, however severe at a given location, is greater at that location than elsewhere.” (emphasis supplied)

Thus, the Court of Special Appeals emphasized that once the applicant shows that it meets the requirements for the special exception under statute, the burden then shifts to the Protestants to show that impacts from the use at a particular location are greater at this location than elsewhere. If the Protestants fail to meet that burden of proof, the requested special exception must be approved.

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The testimony and record developed in this case do not lead to the conclusion that there are no adverse impacts associated with this communications tower. To the contrary, every communication tower has associated with it some adverse impacts including the visual intrusion of their presence into the surrounding landscape. However the test for approval is not whether there is a material impact but whether that impact at the proposed location is greater than the impacts normally associated with a communications tower regardless of its location within the zone. The Harford County Code provisions governing the grant of a special exception use for a communication tower are onerous indeed and place a substantial burden of proof upon an applicant wishing to construct such a tower. The Code requirements are designed to uncover each and every impact associated with a tower and allow a thorough analysis of those impacts to be developed and considered by the Board. The Hearing Examiner reviewed each of those requirements in detail herein and concluded that the Applicants proposal meets or exceeds each Code requirement for approval of a communications tower. There was testimony in opposition to this tower that its visual impact could not be screened from view. While that is undisputed, it is also undisputed that every communications tower, by its very nature, is incapable of being fully screened from view of neighboring properties. The duty of the Hearing Examiner is to evaluate if the proposed tower at this location has materially greater visual impact than another tower at another location. At this location there are substantial distances between the tower location and neighboring properties that provide desirable buffer; the tower is significantly shorter than other towers found in Harford County; there is substantial natural forestation that provides significantly more screening than that found at other tower locations; the surrounding area is rural and sparsely populated resulting in significantly decreased impacts compared to other possible tower locations within the Agricultural zone.

Based on the facts presented and applying the guidance of the Schultz and Mossburg courts, the Hearing Examiner comes to the inescapable conclusion that this proposed communication tower meets or exceeds each and every statutory requirement of the Harford County Code and will not result in adverse impacts greater than or different than similar monopole communication towers found at other possible locations within the Agricultural zone.

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For the foregoing reasons, the Hearing Examiner recommends approval of the request subject to the following conditions:

1. The Applicants submit a site plan for review and approval through the Development Advisory Committee (DAC) process.
2. The Applicants shall obtain any and all necessary permits and inspections.
3. The Applicant shall construct the facility in general conformance to the submitted site plan.

Date DECEMBER 2, 2002

William F. Casey  
Zoning Hearing Examiner